

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 33861

AMERICAN MODERN HOME INSURANCE COMPANY,

Plaintiff,

v.

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

**JEFF CORRA, COURTNEY D. MCDONOUGH,
MORGAN BROWN, THE ESTATE OF MATTHEW HUMPHREYS,
And THE ESTATE OF JOSHUA B. TUCKER**

**BRIEF OF DEFENDANT, JEFFREY TUCKER,
AS ADMINISTRATOR OF THE ESTATE
OF JOSHUA B. TUCKER, IN SUPPORT OF LAW AND
AFFIRMATIVE ANSWER TO THE
FEDERAL COURT'S CERTIFIED QUESTION**

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COMES NOW the Defendant, The Estate of Joshua B. Tucker, through the Administrator of said estate, Jeffrey Tucker, and by counsel D. Scott Bellomy, and respectfully submits this Brief of Defendant, Jeffrey Tucker, as Administrator of the Estate of Joshua B. Tucker, in Support of Law and Affirmative Answer to the Federal Court's Certified Question.

I. INTRODUCTION

The Estate of Joshua B. Tucker submits this brief on the question of law certified by the United States District Court for the Southern District Court of West Virginia in American Modern Home Insurance Company v. Jeff Corra, et al., Civil Action No. 6:06-CV-01015.

Despite American Modern Home Insurance Company's (hereinafter "AMHIC") assertion, this is not a claim that Jeff Corra provided alcohol to an individual, under the age of twenty-one, who was later involved in an automobile accident. Instead, the Estate of Joshua B. Tucker asserts that this is a claim against an insured who negligently provided a place (his residence and land) for the under twenty-one driver to consume alcohol provided by others.

The United States District Court of the Southern District has certified to this Court the question of whether knowingly permitting an underage adult to consume alcoholic beverages on a homeowner's property constitutes an occurrence within the policy language.

Counsel for the home owner's insurance argues coverage is triggered by an occurrence, which is defined as an accident. Counsel for the home owner's insurance then cites *State Bancorp, Inc. v. U.S. Fidelity and Guar. Ins. Co.*, 199 W.Va. 99, 483 S.E.2d 228 (1997) and

then surmises Jeff Corra's conduct was not an accident pursuant to the case. Obviously, the Estate of Joshua B. Tucker agrees that the insured, Jeff Corra, intentionally provided a place for the driver of the vehicle causing the fatal crash, Courtney McDonough, to consume alcohol. Nevertheless, the triggering event or occurrence is the automobile accident which occurred one half ($\frac{1}{2}$) a mile from Jeff Corra's house. That is the occurrence that is "independent and unforeseen happening which produces the damages", *State Bancorp, Inc. v. U.S. Fidelity and Guar. Ins. Co.*, not the deliberate act of providing them with a place to party and consume alcohol.

The insurance company then cites *Illinois Farmers Ins. Co. v. Duffy*, 618 N.W.2d 613 (Minn. 2001) as authority for its proposition that no occurrence happened to engage coverage. That case is easily distinguished from the case at bar in that the insured in the Minnesota case provided the alcohol. In the current matter it is undisputed that **Jeff Corra provided Courtney McDonough with only one half ($\frac{1}{2}$) a beer**. Thus, the occurrence is not the providing of beer, but is instead the providing of a place (his insured home) to become intoxicated.

If the insurance company reasoning is taken to its logical conclusion, then negligence never occurs because it always starts from an intentional act. For example, using the insurance company's logic, coverage would be denied if a smoker fell asleep while smoking and accidentally dropped his cigarette into the couch, and a fire burned the trailer to the ground. Because, in the insurance company's analysis the smoker's first act in the chain (lighting a cigarette) was a deliberate act, no coverage or negligence ensues. Obviously, that is not the case because the Supreme Court of Appeals of West Virginia used the word

“unless” when defining accident. “Unless same additional ...happening occurs which produces the damage”. *Robertson v. LeMaster*, 171 W.Va. 607 301 S.E.2d 563 (1983). An accident did occur and it occurred approximately one half (½) a mile from Jeff Corra’s residence that is apparent in the case at bar.

The insurance company continues to paint with a broad brush alleging Jeff Corra provided alcohol to minors. And that is true, Jeff Corra was so convicted. But the driver of the vehicle in the wreck, Ms. Courtney McDonough only received from Jeff Corra one half (½) a beer (transcript, pg 141) is undisputed.

Accordingly, the Estate of Joshua B. Tucker submits that this Court should determine that Jeff Corra’s negligence in providing his house as a place for the driver to consume alcohol and become intoxicated is an occurrence under said policy triggering coverage. Although AMHIC seeks protection from *W.Va. Code §60-3-22(a)* and Jeff Corra’s conviction, this section does not provide the protection sought for the reasons stated herein.

II. STATEMENT OF FACTS

On or about the 6th day of August, 2006, the insured, Jeff Corra permitted his daughter to have a party at their residence on Rector Road (the house of the owner and insured) near Rosemar Road, Parkersburg, West Virginia. At said party alcohol was consumed by underage drinkers. Jeff Corra did provide Courtney McDonough with a Coors Light of which she consumed half the can. (transcript, pg 133) Courtney McDonough then left Jeff Corra’s residence to get more beer. (transcript, pg 136) During that time Courtney McDonough was gone

for at least a half an hour. (transcript, pg 141) She went to a seven-eleven (7-11) convenience store where Budweiser Beer was purchased by Josh Tucker and then drove to a local establishment known as Kokomo's. (transcript, pg 143) After leaving Kokomo's she returned to the party at Jeff Corra's and consumed the additional beer. (transcript, pg 144)

Later, after Ms. McDonough consumed six to seven Budweisers (transcript, pg 146 and 169) purchased by Josh Tucker and Matthew Humphrey, she became intoxicated (transcript, pg 169 and 170) on drinking the Budweiser. (Id. and also pg 170, but objection sustained). She, Josh Tucker, Matthew Humphreys and Morgan Brown left to go to the British Petroleum (BP) station. After leaving the nearby British Petroleum (BP) station to return to Jeff Corra's house Ms. McDonough's Jeep left the roadway, Josh Tucker and Matthew Humphrey's died at the scene. Morgan Brown was severely injured. Ms. McDonough pled guilty to DUI causing death.

A party was ongoing during this evening at the Corra house. Several individual juveniles testified that underaged (see generally transcript) adults were consuming beer at the Corra residence. Nevertheless social host protection should not be extended to Jeff Corra because he was not a social host. In *Overbaugh v. McCutcheon*, 183 W.Va. 386, 396 S.E.2d 153 (1990), the Court held that "... there is generally no liability on the part of the social host who gratuitously furnishes alcohol to a guest when an injury to an innocent third party occurs as result of the guest's intoxication." Jeff Corra does not deserve that protection because he only provided Courtney McDonough (the driver of the vehicle) one half of a beer. (transcript pg 133). He instead provided Courtney McDonough with a place (his

residence) to become intoxicated upon others (including her own) beer. (transcript pg 141) As this Court noted in *Overbaugh* the legislature governs the policy and control of alcohol in its various forms. Interestingly, *W.Va. Code § 60-3-22* at the the of the *Overbaugh* decision dealt only with criminal liability of a vendor.

Thus, this Court determined that the legislature did not wish to place liability on a social host for providing alcohol. However, as the insurance company points out, now criminal liability has been extended to those who provide alcohol to someone less than twenty-one years of age. In fact, Jeff Corra was so convicted. Yet, even though he was so convicted this wreck did not arise out of his criminal conduct because he only gave her one half of a beer. Thus, the legislature seems to have determined subsequent to the *Overbaugh* decision that there is liability (at least criminal liability) for a social host providing alcohol. Further his mere conviction does not mean the accident arose from his criminal conduct as the policy exclusion requires.

III. DISCUSSION OF LAW

A. STANDARD OF REVIEW.

With respect to the standard of review in certified question cases, this Court has held:

When considering a certified question, we generally accord the original court's determination thereof plenary review. "a *de novo* standard is applied by this [C]ourt in addressing the legal issues presented by a certified question from a district court or appellate court. ' Syl. Pt. 1, *Light v. Allstate Ins. Co.*, 203 W.Va. 27, 506 S.E.2d 64 (1998)." Syl. Pt. 2, *Aikens v. Debow*, 208 W.Va. 486, 541 S.E.2d 576 (2000). Accord Syl. Pt. 1, *Bower v. Westinghouse Elec. Corp.*, 206 W.Va. 133, 522 S.E.2d 424 (1999) ("This Court undertakes

plenary review of legal issues presented by certified questions from a federal district court or appellate court.”)

Additionally, “[t]he interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination which, like the court’s summary judgment, is reviewed *de novo* on appeal.” Finally, “[d]etermination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law.”

The Estate of Joshua B. Tucker’s prior counsel did place AMHIC on notice as to its claim under the policy. AMHIC then filed its declaratory judgment action in Federal Court in an attempt to avoid paying its \$300,000 policy limits to the deceased’s families.

B. THE CLAIM AGAINST JEFF CORRA IS AN OCCURRENCE THAT TRIGGERS COVERAGE.

The District Court has certified the following question of law to this Court:

The homeowner’s policy in effect at the time of the underlying events provides coverage for an “occurrence,” which is defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period in . . . bodily injury or property damage.” Under West Virginia law, does knowingly permitting an underage adult to consume alcoholic beverages on a homeowner’s property constitute an “occurrence” within the meaning of the AMHIC homeowner’s policy at issue in this case?

The claim that the Estate of Joshua B. Tucker brings to the court is relatively straight forward. Law School teaches that to prove

negligence, the plaintiff must prove four elements: duty, breach, causation, and damages.

a. Duty

Jeff Corra had a duty not to provide underage drinkers with a place to party and consume alcohol. Further, Jeff Corra had a duty once he recognized he had created a dangerous situation to use reasonable care to remedy the dangerous situation.

b. Breach of Duty

Jeff Corra breached the duty when he permitted his daughter Ashley Corra to have friends over for a party. He breached his additional duty when he saw underage drinkers, particularly Courtney McDonough and did not cease the activities on his property. Instead, he ignored the underage drinkers as they consumed beer and became intoxicated. Further, he did not use reasonable care to prevent the threatened harm.

c. Causation

Jeff Corra's breach of his duty caused Joshua Tucker damages. If not for Jeff Corra providing Courtney McDonough with a place to become intoxicated she would not have become intoxicated. If she had not become intoxicated, she would not have wrecked and if she would not have wrecked, Josh Tucker would be alive.

d. Damage

Joshua Tucker was killed in the accident resulting from Jeff Corra's negligence. A mother, father, brother, and sister are left without Joshua.

Counsel for the home owner's insurer attempts to paint her insured with a broad brush. She argues her insured "Jeff Corra was convicted of multiple counts of providing alcohol to underage persons arising out of the event." The estate of Joshua Tucker agrees Mr. Corra was so convicted; however, let's narrow our focus to the important person in this situation, Courtney McDonough. Courtney McDonough was the driver when the vehicle left the roadway and Joshua Tucker, Matthew Humphreys were killed and Morgan Brewer was injured. Thus, let's not chase red herrings as to who else was intoxicated, or for what other "victims" Jeff Corra was convicted, but instead focus on the important aspects of the case. The question is whether Joshua Tucker's death "arose" from Jeff Corra's criminal conduct. (See Insurance Policy, pg 13 of 18) Joshua Tucker's representative argues Joshua Tucker's death did not arise from Jeff Corra's criminal conduct. Courtney McDonough did not become intoxicated on Jeff Corra's alcohol. He only provided her with one half (1/2) a beer. Instead she became intoxicated on the Budweiser she and the others went to get after the party started.

The insuring clause for the "personal liability" coverage of the subject policy states:

If a claim is made or a suit is brought against any **insured person** for damages because of **bodily injury** or **property damage**, caused by an **occurrence**, to which this coverage applies, we will:

1. pay up to our liability limit for the damages for which the **insured person** is legally liable, except for punitive or exemplary damages.

However, we will pay no more than \$10,000 for any claim made or suit brought against any **insured person** for **bodily**

injury or property damage caused by any animal owned by, or in the care, custody or control of, any **insured person**. This limit is the maximum we will pay for any one **occurrence**.

2. provide a defense at our expense by counsel of our choice. We may investigate and settle any claim or suit that we decide is appropriate. Our obligation to defend any claim or suit ends when the amount we pay for damages resulting from the **occurrence** in settlement of a claim(s) or in satisfaction of a judgment(s) equals our liability limit. We have no duty to defend any suit or settle any claims for **bodily injury** or **property damage** not covered under this policy.

[Insurance Policy attached at 12 of 18]. Coverage is, therefore, triggered by an "occurrence" which is defined as

an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in:

- a. **bodily injury**; or
- b. **property damage**.

The Estate of Joshua B. Tucker submits that the allegations arise from Jeff Corra providing a place for underage drinkers to consume alcohol not for providing Courtney McDonough with one half of a beer.

It is undisputed Courtney McDonough drank one half (½) a Coors Light provided by Jeff Corra. (transcript, pg 141) She then left to go to Seven-eleven (7-11) and Kokomo's. (transcript, pg 143). And

when she returned to Jeff Corra's house she began to drink the Budweiser obtained from Seven-Eleven (7-11).

C. THE AFFECT OF ONE HALF OF A BEER ON COURTNEY MCDONOUGH.

Pursuant to *W.Va. Code § 60-6-24*, signs must be posted in establishments that sell alcoholic beverages. The signs show Blood Alcohol levels in order that consumers can estimate their Blood Alcohol Content (BAC). (See statute attached as an exhibit) Pursuant to those findings a one hundred twenty (120) pound person (See attached DMV records evincing Courtney McDonough's weight as 120 pounds) who drank one half ($\frac{1}{2}$) a beer would have a Blood Alcohol Content (BAC) of .0155 (which is below the .02 required to charge an underaged drinker with DUI). Further, that amount would have been sufficiently "burnt up" in the half hour drive to Kokomo's and back to Jeff Corra's residence. Mathematically, we can compute her Blood Alcohol Content (BAC) at approximately .007 when she returned to the party. Of course, the legal limit in West Virginia is .08 is prima facie evidence of intoxication.

In fact, for underage DUI, she must have a minimum Blood Alcohol Content (BAC) of .02. Further, if she were over twenty-one (21) this Blood Alcohol Content (BAC) level is prima facie evidence she was not intoxicated. (See, *17C-5-8(a)(1)* attached as an exhibit). For the insurance company to argue that it is undisputed that the one half ($\frac{1}{2}$) a beer Jeff Corra "provided" to Courtney McDonough is the "undisputed" underlying allegation and cause of this accident and the accident "arises" out of that criminal conduct is asinine. See, eg. The

insurance policy, page 13, which states an exclusion under Section III, 1.b. is bodily harm arising out of any criminal act.

W.Va. Code § 60-3-22(a). Any person who knowingly buys for, gives to or furnishes to anyone under the age of twenty-one, any nonintoxicating beer, wine or alcoholic liquors purchased from a licensee, is guilty of a misdemeanor and shall, upon conviction thereof, be fined not more than five hundred dollars, or imprisoned in the county jail not more than ten days, or both fined and imprisoned.

Thus, although Jeff Corra was convicted under this code section he only gave, furnished, or bought one half (½) Coors Light to Courtney McDonough. To claim that this car wreck "arises" out of providing one half (½) beer to Courtney McDonough is illogical. The injuries arose out of Jeff Corra providing a place for her to consume alcohol and then not using reasonable care to remedy the dangerous situation he created. Additionally, the statute listed above does not criminalize providing a place or opportunity for underage drinkers to consume alcohol. Thus, Joshua Tucker's death did not arise from Jeff Corra's criminal conduct.

**D. JEFF CORRA'S CONVICTION WILL LIKELY BE
OVERTURNED UPON CRIMINAL APPEAL TO THIS COURT.**

James M. Cagle, Esq., on behalf of Jeff Corra has filed an Appeal for his criminal conviction in Wood County Circuit Court. Without completely reiterating the entire petitioner, the Estate of Joshua B. Tucker

1. Jeff Corra was convicted of violating the wrong statute.

Assuming, *arguendo*, the facts of the case as put forth by AMHIC are true, Jeff Corra's conviction under *W.Va. Code § 60-3-22a(b)*

was faulty because that code section criminalizes the furnishing of alcoholic liquors. The evidence at trial was overwhelming that beer was consumed at the party, not liquor. The criminality of providing nonintoxicating beer to under age drinkers is found in *W.Va. Code § 11-16-19(a)*.

2. The evidence at trial did not prove beyond a reasonable doubt Jeff Corra provided/furnished alcohol (or nonintoxicating beer) to underage drinkers

The evidence at trial certainly proved Jeff Corra was present at the party, but failed to prove he provided alcohol to the underage drinkers. Instead, what was abundantly clear was he provided his residence as a location for underage drinkers to consume alcohol.

Thus, this Honorable Court will likely overturn Jeff Corra's conviction upon which AHMIC clings so desperately.

E. INTENTIONAL ACTS EXCLUSION IS INAPPLICABLE TO THIS CLAIM

Once again the insurance company loses sight of the actual facts. Jeff Corra only provided to Courtney McDonough one half ($\frac{1}{2}$) beer. All the other alcohol she and the others consumed (Josh Tucker and Matthew Humphreys) was brought back to the Corra residence after their beer run. Thus, Mr. Corra's negligence in permitting the party is the important factor, not that he intended to provide one half ($\frac{1}{2}$) beer. The testimony is undisputed that she helped herself to the Coors Light. Jeff Corra did not offer her a beer (trial transcript, pg 160), did not hand her a beer (trial transcript, pg 160), and did not

give her permission to take a beer. (trial transcript, pg 164) Thus, the question becomes what is the intentional act Jeff Corra did that resulted in bodily injury? The exclusion must go to causation, and in this case it does not.

Now Jeff Corra's negligence is easily found pursuant to Syl. Pt 10, *Price v. Halstead*, 177 W.Va. 592, 355 S.E. 2d 380 (1987), in which the Supreme Court of Appeals of West Virginia held:

One who engages in affirmative conduct, and thereafter realizes or should realize that such conduct has created an unreasonable risk of harm to another, is under a duty to exercise reasonable care to prevent the threatened harm. Syllabus Point 2, *Robertson v. LeMaster*, 171 W.Va. 607, 301 S.E.2d 563 (1983).

Jeff Corra did engage in affirmative conduct, that conduct was he permitted Courtney McDonough and other underage drinkers to party at his residence. (See transcript generally) Further, he should have realized providing underage drinkers with the place and opportunity to consume alcohol away from the eyes of law enforcement and the public would create a reasonable risk to Joshua Tucker and others. In fact, he did realize the danger. This is evidenced in the proffer his criminal defense lawyer made at his trial. His lawyer vouched the record that Jeff Corra offered to call a cab or permit the youths to stay at his place to become sober. (trial transcript, pg 243) Finally, he breached his duty to exercise reasonable care to prevent the threatened harm.

Thus, the intentional acts exclusion is inapplicable to the case at bar.

F. THE CRIMINAL ACTS EXCLUSION IS INAPPLICABLE TO THIS CLAIM

As previously stated, the criminal acts exclusion is found in Section III 1.b. The language in that exclusion is bodily injury "arising out of any criminal conduct". Joshua Tucker, through his personal representative, does dispute that the claim "arises" out Jeff Corra's criminal conduct.

It is undisputed Courtney McDonough only drank one half ($\frac{1}{2}$) a beer. She then used Jeff Corra's residence to consume six (6) to seven (7) beers from other sources. (trial transcript, pg 169) Thus, it is not a matter of law that the criminal exclusion in this policy bars recovery. No one can assert that this accident arose out of providing one half ($\frac{1}{2}$) a beer to Courtney McDonough. But it is undisputed that Jeff Corra permitted Courtney McDonough to consume her own alcohol and the alcohol of others on his premises.

Thus, he substantially contributed to the motor vehicle accident. The accident did not "arise", however, from Jeff Corra's criminal conduct, but from his negligent omissions.

G. THE MOTOR VEHICLE EXCLUSION IS NOT APPLICABLE TO THIS CLAIM

"f. arising out of the:

- (1) the ownership, maintenance, occupancy, operation, use, loading or unloading of **motor vehicles** or all other motorized land conveyances, including trailers, owned or occupied by or rented or loaned to an **insured person**;

- (2) the entrustment by an **insured person** of a **motor vehicle** or any other motorized land conveyance to any person;
- (3) vicarious liability, whether or not statutorily imposed, for the actions of a child or minor involving a **motor vehicle** or other motorized land conveyance; or
- (4) failure to supervise, or negligent supervision of, any person involving a **motor vehicle** or other motorized land conveyance by an **insured person.**"

The insurance company asserts in their previous argument that "[e]xclusion f (4) clearly and unambiguously applies to any claim of negligent supervision of the driver of the vehicle in question, thereby precluding coverage for the claims presented against American Modern Home Insurance Company's insured" (Insurance Company memo at page 17). The insurance company cites as authority *Huggins v. Tri-county Bonding*, 175 W.Va. 643, 337 S.E.2d 12 (1985). The Estate of Joshua Tucker does not argue, however, that Jeff Corra failed to supervise a person involving a motor vehicle. In fact, Jeff Corra had no right to supervise a vehicle owned and maintained by Joseph McCoy and driven by Courtney McDonough. Nevertheless, he had an affirmative duty to "exercise reasonable care to prevent the threatened harm". Syl. Pt. 2, Robertson, Supra. In the trial transcript Mr. Cosenza vouches the record as follows:

Just so I'm clear on the Court's earlier ruling, this witness does have the knowledge that Mr. Corra asked these people who were out there to stay at his home, that he would provide a cab if they were drinking, and the Judge

has ruled that I'm not allowed to raise that issue, is that correct? (trial transcript, pg 243)

Perhaps Jeff Corra offered a ride to Courtney McDonough. Perhaps Jeff Corra offered to let Courtney McDonough stay at his home and sleep off her intoxication. Nothing proves or disproves those assertions. Thus, the question is one of fact. Therefore, a jury should determine that fact.

If Jeff Corra did make such an offer to Courtney McDonough, perhaps that offer was sufficient to meet his obligation of reasonable care as found in *Robertson*, Supra. However, questions of negligence, due care, proximate cause, and concurrent negligence present issues of fact for the jury where the evidence is conflicting or when the facts, though undisputed, are such that reasonable people may draw different conclusions from them. *Evans v. Farmer*, **148 W.Va. 142**, pt. 2 syl., **133 S.E.2d 710**; *Butler v. Smith's Transfer Corporation*, **147 W.Va. 402**, pt. 8 syl., **128 S.E.2d 32**; *Lester v. Rose*, **147 W.Va. 575**, pt. 14 syl., **130 S.E.2d 80**; *Leftwich v. Wesco Corporation*, **146 W.Va. 196**, pt. 7 syl., **119 S.E.2d 401**; *Brace v. Salem Cold Storage, Inc.*, **146 W.Va. 180**, pt. 5 syl., **118 S.E.2d 799**; *Spurlin v. Nardo*, **145 W.Va. 408**, pt. 3 syl., **114 S.E.2d 913**; *Lawrence v. Nelson*, **145 W.Va. 134**, pt. 1 syl., **113 S.E.2d 241**; *Clay v. Walkup*, **144 W.Va. 249**, pt. 2 syl., **107 S.E.2d 498**; *Wilson v. Edwards*, **138 W.Va. 613**, pt. 4 syl., **77 S.E.2d 164**; *Barr v. Curry*, **137 W.Va. 364**, **371-72**, **71 S.E.2d 313**, **317**. The province of the jury as the trier of fact is fundamental in our system of jurisprudence. Joshua B. Tucker's Estate is not asserting he failed to supervise a vehicle, but the question is whether he used reasonable care once he created and realized he created a dangerous situation. That is always a question of fact for a jury to decide.

IV. CONCLUSION

The insurance company is trying to hide behind facts that are irrelevant and or immaterial to the discussion. Everyone agrees Jeff Corra was convicted for providing alcohol to underage drinkers, including Courtney McDonough. However, the evidence is undisputed that he merely provided her with one half ($\frac{1}{2}$) a beer. Pursuant to the burn rate and Blood Alcohol Charts that must be posted in W.Va. bars, she was not intoxicated by consuming that one half ($\frac{1}{2}$) a beer. In fact, her Blood Alcohol Content (BAC) level from that one half ($\frac{1}{2}$) a beer was prima facie evidence she was not intoxicated. Thus, for the insurance company to argue that his accident "arises" from that one half ($\frac{1}{2}$) a beer is disingenuous. This is true whether the insurance company tries to exclude coverage under an intentional acts exclusion, a criminal acts exclusion, or a medical payments exclusion.

Once Jeff Corra permitted these underage drinkers to use his residence to hide their conduct from the public, he engaged in affirmative conduct ... which created a duty to exercise reasonable care to prevent the harm. Syl. 2, Robertson v. LeMaster, Supra. Jeff Corra offered to some of the underage drinkers an opportunity to stay or he would telephone a cab for them. Obviously, he realized he had created an unreasonable risk. No one is certain whether he made that offer to Courtney McDonough or not. Assuming, *arguendo*, Mr. Corra did make that offer to Courtney McDonough, whether that offer would be reasonable care is an issue for a Wood County Jury to determine.

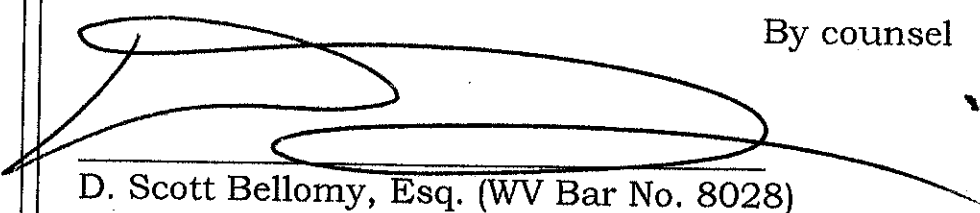
Joshua Tucker's Estate recognizes an automobile exclusion exists in this home owner's policy. Nevertheless, it is inapplicable to

the case at bar. Mr. Corra's failure was not one to supervise an automobile. As explained earlier he had no right to supervise Courtney McDonough or her automobile. He did have a duty to use due care. Insurance policies that require construction must be construed liberally in favor of the insured. Syl. pt.3, *Polan v. Traveler Ins. Co.*, 156 W.Va. 250 (1972). Mr. Corra's coverage should not be excluded because he had no right to supervise a vehicle that he did not own or have control over. Summary judgment is never authorized if there is any genuine issue of fact between the parties. See, *Taylor v. C & O Ry.*, 518 F2d 536 (4th Cir 1975).

WHEREFORE, this defendant requests that the Court answer the certified question in the affirmative to find that Jeff Corra's conduct is considered an "occurrence" pursuant to the policy and West Virginia law.

JEFFREY TUCKER, as
Administrator of the Estate
JOSHUA B. TUCKER,

By counsel



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